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In the Supreme Court of the United States

OCTOBER TERM, 1977

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ALPERS' JOBBING COMPANY, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

Respondent contends (Br. in Opp. 1–7) that this Court lacks jurisdiction to consider the Board's petition for certiorari because the Board's petition for rehearing was untimely and thus did not toll the judgment below, which was entered more than 90 days before the petition for certiorari was filed (28 U.S.C. 2101(c)).[1] This contention fails to give effect to Rule 26(b) of the Federal Rules of Appellate Procedure,

[1] A timely filed petition for rehearing tolls the lower court's judgment until the court disposes of the petition for rehearing. *United States* v. *Healy*, 376 U.S. 75, 78–79; *Department of Banking* v. *Pink*, 317 U.S. 264, 266.

and misconceives the principles governing the filing of petitions of rehearing out of time.

1. Rule 26(b), Fed.R.App.P., provides that "[t]he court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or *may permit an act to be done after the expiration of such time*" (emphasis added).[2] In the present case, the Board filed its petition for rehearing with the court of appeals well within the 90-day period for seeking certiorari (counting from the entry of the judgment), but not until several days after the authorized extension of the 14-day period prescribed in Rule 40(a), Fed.R.App.P., had expired.[3] The Board therefore moved the court below for leave to file the petition for rehearing out of time (see Motion, *infra,* pp. 10–11). The court, finding that the Board had satisfied the "good cause" requirement of Rule 26(b), directed that the "untimely petition" be filed (Br. in Opp. A–3).

The time for filing a petition for certiorari was therefore tolled until the order denying rehearing was

[2] Rule 26(b) lists specific instances in which the court is precluded from enlarging the time for performance; the list does not include petitions for rehearing.

[3] The judgment was entered on December 30, 1976. On January 14, 1977, the court below extended the time for filing a petition for rehearing to January 27, 1977 (a copy of the court's order is set forth, *infra*, p. 9). The petition for rehearing was not received by the court below until February 2, 1977. A printer's error on the cover of the petition had caused it to be mailed to the wrong circuit. See Motion for Leave to File the Board's Petition for Rehearing and Suggestion for Rehearing In Banc Out of Time, *infra*, pp. 10–11.

entered.[4] The "filing of an untimely petition for rehearing which is not entertained or considered on its merits, or a motion for leave to file such a petition out of time, if not acted on or denied by the trial court, cannot operate to extend the time for appeal. But where the court allows the filing and, after considering the merits, denies the petition, the judgment of the court as originally entered does not become final until such denial, and the time for appeal runs from the date thereof." *Bowman* v. *Loperena,* 311 U.S. 262, 266. Here the court, after expressly directing that the petition be accepted for filing, should be deemed to have entertained and considered the petition on its merits no less than if it had been filed within the prescribed 14-day period or within a timely extension of that period (which is also subject to the "good cause" requirement of Rule 26(b)). That the court did so entertain and consider the petition is confirmed by the fact that the court gave the petition, which sought a reexamination of the basis for the panel decision, *en banc* consideration, ultimately denying it by an evenly divided vote.[5]

Tolling the time in which to petition for certiorari, after a court of appeals has determined to consider an untimely petition for rehearing filed within the original certiorari period, is a policy that serves judi-

[4] The petition is set forth, *infra*, pp. 12–18.

[5] The court's order was entered on March 15, 1977 (Pet. App. 29). On June 6, 1977, Mr. Justice Blackmun extended the time for filing a petition for certiorari to July 13, 1977, and the petition was filed on July 12, 1977.

cial economy without impairing other substantial rights. If there were doubt whether the lower court's acceptance of an untimely petition for rehearing would extend the time for filing a petition for certiorari, parties out of time under Rule 40(a), Fed. R. App. P., would be forced to file protective petitions for certiorari whenever the lower court had not finally ruled on the petition for rehearing before the 90-day period from the entry of judgment had expired. This practice would not only inhibit forthright reconsideration by the court of appeals but would encumber this Court's already crowded docket with documents that might ultimately have been avoided. As this Court has stated in a related context (*United States* v. *Healy,* 376 U.S. 75, 80):

> It would be senseless for this Court to pass on an issue while a motion for rehearing is pending below, and no significant saving of time would be achieved by altering the ordinary rule to the extent of compelling a notice of appeal to be filed while the petition for rehearing is under consideration.

2. The Company's heavy reliance (Br. in Opp. 4–6) on *Pfister* v. *Northern Illinois Finance Corp.,* 317 U.S. 144, is misplaced. In that case the Court was faced with an attempt to rejuvenate an extinguished right of appeal by means of a petition for rehearing. The Court ruled that, where the time for appeal had previously expired, the denial of a subsequently filed petition for rehearing would not revive the right of appeal absent a showing on the face of the denial that the

lower court had reexamined the basis of the original order. 317 U.S. at 149–150. The distinction between that situation and the one here was explained by Judge Magruder in *Denholm & McKay Co.* v. *Commissioner of Internal Revenue,* 132 F. 2d 243, 247–248 (C.A. 1):

> A petition for rehearing may be filed out of time, in two senses; (1) it may be filed after the period prescribed by rule of court within which such petitions may be filed, but before the statutory period for appeal has expired, and (2) it may be filed after the statutory period for taking an appeal has elapsed.
>
> If untimely in the first sense, the court may nevertheless grant special leave for the filing of the petition for rehearing, which would indicate that the grounds urged in such petition will be considered on their merits. This is "entertainment" of the untimely petition; and the time for taking an appeal will not begin to run until the petition is disposed of. See *United States* v. *Seminole Nation,* 1937, 299 U.S. 417, 57 S.Ct. 283, 81 L.Ed. 316; *Bowman* v. *Loperena,* 311 U.S. 262, 266, 61 S.Ct. 201, 85 L.Ed. 177. * * *
>
> If a petition for rehearing is untimely in the second sense, that is, if it is filed after the statutory period allowed for taking an appeal has elapsed, special considerations apply, as the Supreme Court pointed out in its recent decision in *Pfister* v. *Northern Illinois Finance Corp.,* 63 S.Ct. 133, 87 L.Ed.—, November 16, 1942. See also *Mintz* v. *Lester,* 10 Cir., 1938, 95 F. 2d 590. * * *

The distinction identified by Judge Magruder rests on substantial grounds. Where the time for appeal has expired, it would defeat the strong policy of finality and repose to permit petitions for rehearing to be entertained, even for good cause, unless the lower court is prepared to reopen the judgment, *i.e.*, to reconsider the very foundation of its original judgment. Cf. *Greater Boston Television Corp.* v. *Federal Communications Commission,* 463 F. 2d 268, 277–280 (C.A.D.C.); *Hines* v. *Royal Indemnity Co.,* 253 F. 2d 111, 114 (C.A. 6) (a mandate once issued will not be recalled except in exceptional circumstances). See also *Isenberg* v. *Sherman,* 214 Cal. 722, 7 P.2d 1006 (Sup. Ct.), petition for certiorari denied, 286 U.S. 547 (state court lacked power to recall remittitur absent fraud or deception). On the other hand, where an untimely petition for rehearing is filed before the time for appeal has expired, the policy of finality and repose is not disturbed, and the lower court need only find good cause to entertain the petition.

The situation here falls in the latter category: the petition for rehearing was "filed after the period prescribed by rule of court within which such petitions may be filed, but before the statutory period for appeal has expired." *Denholm & McKay Co., supra.* Accordingly, when the court below, in exercising its authority under Rule 26(b), Fed.R.App.P., found "good cause" to permit the filing of the petition, that action was sufficient to toll the time for filing a petition for certiorari until the petition for rehearing had been

finally ruled on. The petition for certiorari was thus timely filed (n. 5, *supra*).

CONCLUSION

For these reasons, as well as those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JOHN S. IRVING,
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SEPTEMBER 1977.

APPENDIX

United States Court of Appeals for the Eighth Circuit

No. 76-1131—September Term, 1976

ALPERS' JOBBING COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Petition for Review of Order of the National Labor Relations Board

For cause shown it is now here ordered that respondent may have to and including January 27, 1977 in which to file petition for rehearing.

JANUARY 14, 1977.

United States Court of Appeals for the
Eighth Circuit

No. 76–1131

ALPER'S JOBBING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Motion for Leave to File the Board's Petition for Rehearing and Suggestion for Rehearing In Banc Out of Time

To the Honorable, the Judges of the United States Court of Appeals for the Eighth Circuit:

The National Labor Relations Board, by its Deputy Associate General Counsel, respectfully moves this Court for leave to file the Board's petition for rehearing and suggestion for rehearing in banc herein out of time. In support of its motion, the Board shows as follows:

1. The Board's petition was due on January 27, 1977, pursuant to an extension of time granted by the Court on January 14, 1977.

2. A printing error necessitated a last minute change of the cover on the petition which was the wrong color. Counsel inadvertently failed to notice that the new cover designated the Sixth, rather than the Eighth Circuit, and the petitions were mailed to the Court indicated on the cover.

3. We have been informed by the Clerk of this Court that the petitions were received in the Sixth

Circuit on January 31, 1977, and have been forwarded to this Court. Allowing for three days mailing time, the Board's petition would have been due on January 31, 1977, since the third day fell on a Sunday, hence the Board's petition was timely received, albeit by the wrong Circuit.

4. The issues raised by the Board's petition are of great importance and this Court should not be denied the opportunity to consider those issues because of a printing error.

WHEREFORE, the Board respectfully requests that its motion for leave to file the Board's petition for rehearing and suggestion for rehearing in banc instanter out of time be granted.

Respectfully submitted,

ELLIOTT MOORE,
Deputy Associate General Counsel,
National Labor Relations Board.

Dated at Washington, D.C., this 10th day of February, 1977.

United States Court of Appeals for the Eighth Circuit

No. 76-1131

ALPER'S JOBBING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board

Petition of the National Labor Relations Board for Rehearing and Suggestion for Rehearing In Banc

Pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure, and Rule 7 of the Rules of this Circuit, the National Labor Relations Board respectfully petitions the Court for rehearing, and suggests rehearing in banc, to reconsider the majority decision entered by a panel of this Court on December 30, 1976,[1] setting aside the Board's finding that the Company violated Sections 8(a)(5) and (1) of the Act by refusing to bargain with the Union[2] certified as the exclusive representative of the Company's employees.

The sole issue in this case is the validity of the Union's certification by the Board after a secret

[1] The panel consisted of Circuit Judges Bright and Webster and Senior District Judge Smith, Eastern District of Michigan, sitting by designation.

[2] Teamsters, Local Union No. 688.

ballot election in which seven employees clearly marked their ballots in favor of the Union and six employees cast votes against representation. While recognizing the Board's broad discretion in establishing procedures and safeguards necessary to insure a fair election and the presumption that ballots cast pursuant to those procedures reflect the true desires of participating employees, the panel majority nevertheless refused to uphold the Board's certification because it found that one employee "may have erroneously marked his ballots in favor of the Union." (Slip op., p. 9). The panel majority based this finding on inferences drawn from statements made after the election and on alleged deficiencies in the balloting procedures which were not even raised by the Company until after the final tally of ballots. Despite the panel majority's attempt to limit its holding to the special circumstances of this case, the necessary effects of its decision are to contravene principles previously established by this Court and enunciated in numerous opinions of the Supreme Court and of other United States Circuit Courts and also to question the integrity of the Board's election process and endanger employees who participate in future Board elections.

1. The Board and courts, including this Court and the Supreme Court, have long recognized the dangers inherent in allowing voters to testify regarding their intent in voting and have "acknowledged [the] superiority of the election process" for determining whether a union has majority support. *N.L.R.B.* v. *Gissel Packing Co.*, 395 U.S. 575, 602 (1969); *Semi-Steel Casting Co.* v. *N.L.R.B.*, 160 F. 2d 388, 392 (C.A. 8, 1947), cert. denied, 332 U.S. 758; *N.L.R.B.* v. *Clearfield Cheese Co.*, 322 F. 2d 89 (C.A. 3, 1963);

Harlan #4 Coal Company v. *N.L.R.B.*, 490 F. 2d 117, 122–123 (C.A. 6, 1974); *N.L.R.B.* v. *Southern Health Corp.*, 514 F. 2d 1121, 1126 (C.A. 7, 1975). This rule is based upon important policy considerations which are, in effect, undermined by the panel majority's decision in the instant case.

First, such testimony "is likely not to be satisfactory or useful." *N.L.R.B.* v. *Southern Health Corp., supra,* 574 F. 2d at 1126. Accordingly, the Supreme Court has rejected "any rule that requires a probe of an employee's subjective motivation as involving an endless and unreliable inquiry." *N.L.R.B.* v. *Gissel Packing Co., supra,* 395 U.S. at 608. Despite the recognized unreliability of testimony regarding a voter's intent, the panel majority held that the post-election affidavits in the instant case were buttressed by the fact that the three employees in question were challenged by the Union and by the fact that all three sought assistance from the employer prior to the election. However, as indicated by the Regional Director's Report on Challenged Ballots (A. 8–11), the Union's challenges were based on legitimate questions concerning the eligibility to vote in the election. Although it is unlikely that a Union would challenge employees who had indicated that they supported the Union, the most that can be inferred from the Union's challenges is that the employees' true position was uncertain. Nor is the reliability of the affidavits of Sacus, Melinas and Dubinsky enhanced by the fact that they approached the employer for assistance before the election and to protest the vote after the results became known. Such actions are no more reliable than the affidavits themselves, for an employee might have much to gain by impressing the employer or the union with his apparent support

before the election or by identifying his vote after the election. See, *International Union of Electrical Radio & Machine Workers* v. *N.L.R.B.*, 418 F. 2d 1191, 1202 (C.A. D.C., 1969).

The precarious relationship between the employees and both their employer and the union provides an additional and more important reason for rejecting the testimony of voters regarding their intention in voting. As this Court has stated: "[t]he reception of such evidence would also expose the employee to the hazard of union or employer coercion and thus imperil his freedom of choice of a bargaining representative." *Semi-Steel Casting Corp.* v. *N.L.R.B., supra,* 160 F.2d at 392. Cf. *N.L.R.B.* v. *A. J. Tower Co.,* 329 U.S. 324, 332 (1946). The absence of evidence of coercion in the instant case does not diminish the grave risk created by the decision of the panel majority for voters in future elections, particularly those voters whose ballots may become identifiable as a result of challenges.[3]

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[3] Similar considerations are reflected in the long and well established rule that testimonial evidence of jurors is inadmissible to impeach their verdict. As stated by the Supreme Court in *McDonald* v. *Pless*, 238 U.S. 264, 267–268 (1915):

". . . let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party * * *. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference."

See also, *Chicago Rock Island and Pacific Railroad Co.* v. *Speth*, 404 F. 2d 291, 295–296 (C.A. 8, 1968); *United States* v. *Schroeder*, 433 F. 2d 846, 851 (C.A. 8, 1970), cert. denied 400 U.S. 1024, 401 U.S. 943 (1971).

The effect of the panel majority's decision herein is to permit the Company to supplant a clearly and unambiguously marked secret ballot by means of affidavits obtained by the Company's attorney after the election. Cf. *Roberts Door & Window Company* v. *N.L.R.B.*, 540 F.2d 350, n. 3 (C.A. 8, 1976). Such a result is not only contrary to established precedent but also constitutes unwarranted interference with the Board's procedures by inviting sharp practices and the use of unreliable evidence. Moreover, the decision poses serious danger for participants in future Board elections for, as noted by Judge Webster in his dissenting opinion.

> The purpose of the secret ballot is to assure the voter his right to exercise his true choice in secret no matter what he may have felt it necessary to say previously. [footnote omitted].
>
> It is better that an election fairly conducted be allowed to stand regardless of claims of mistake than that employees whose votes were unsuccessfully challenged be made cat's paws in the election contest. (Slip op., at 11–12).

2. The foregoing considerations provide sufficient support for enforcement of the Board's order herein even assuming that one voter, in fact, made a mistake in marking his ballot. However, it should be noted that the precautions taken to guard against such mistakes were, at least, adequate. It is undisputed that the ballot and voting procedure was explained to the three employees in question numerous times prior to the election. In view of such repeated instruction it is doubtful that even illiterate employees would fail to recognize whether a ballot was up-

side down.[4] Moreover, the fact that the Company failed to request any further assistance for its employees is "compelling evidence that the proposed procedure was sufficient." *N.L.R.B.* v. *Lowell Corrugated Container's Corp.*, 431 F. 2d 1196, 1197 (C.A. 1, 1970); *Laars Engineers, Inc.*, 173 NLRB 514, 69 LRRM 1376 (1968). Nor was the Union observer's challenge of Marshall Dubinsky a disturbance of sufficient magnitude to warrant setting the election aside. Even if the challenge created some minor confusion, it could hardly be said to have "created an environment of tension or coercion such as to preclude employees from exercising a free choice." *N.L.R.B.* v. *Zelrich Co.*, 344 F. 2d 1011, 1015 (C.A. 5, 1965); *N.L.R.B.* v. *Golden Age Beverage Co.*, 415 F. 2d 26, 32 (C.A. 5, 1969).

The panel majority failed to indicate how an election could have been more fairly conducted in this case. In fact, as noted by Judge Webster "[i]t is not clear that anything more could have been done." (Slip op., at 11, n. 1). To allow an election conducted under adequate safeguards to be set aside because of allegations of mistake would not only cast doubt upon any future election involving the employees of this Company but would similarly affect all future Board elec-

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[4] The panel majority's reliance on the fact that employee Louis Sacus, whose eyesight was poor, left his glasses at home on the day of the election would seem particularly misplaced. In an affidavit to a Board agent, Sacus stated that he could see that "yes" has 3 letters and "no" has 2 letters even without his glasses. Moreover, the Board agent explained the ballot to Sacus at the time of the election, showing him which box to mark in order to vote yes and which to mark to vote no (A. 35).

tions involving small numbers of employees, or employees who are elderly, excitable, or illiterate.

CONCLUSION

For these reasons, the Board respectfully requests that this petition for rehearing be granted, and that upon such rehearing the Court sustain the Board's finding that the Company's refusal to bargain violated Section 8(a)(5) of the Act.

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JANUARY, 1977.

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